

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

VISION BATTERY USA, INC.

and

Case 16-CA-271723

JIE ZHAO, An Individual

Becky Mata, Esq.,
for the General Counsel
Alison Battiste, Esq.
for the Respondent
Jie Zhao,
for the Charging Party.

DECISION

INTRODUCTION¹

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. The primary issue in this case is whether Vision Battery USA, Inc. (“Respondent”) discharged Jie “Grace” Zhao for engaging in protected concerted activity when she demanded that president Pohan “Darren” Chen formally apologize to her for using an expletive during their one-on-one telephone conversation on January 5, 2021.² Chen called Zhao that morning to request a document, which Zhao was unable to provide. Out of frustration, Chen uttered a Mandarin Chinese expletive “ma de,” which is equivalent to “damn” in English. Zhao began yelling at Chen and accusing him of using “vulgar” language, and then she hung up on him. After that, Zhao messaged Respondent’s sales manager Chenqui “Alice” Lu and its operations manager Ken Middick, stating Chen had called her “a dirty word” and she might resign if he did not apologize to her. Lu later called and spoke to Zhao, venting about Chen and his management style. Following that call, Zhao messaged Chen demanding a formal apology for his “wrong behavior” and threatening “potential legal involvement.” That same day, Chen spoke with Lu and Middick about Zhao’s message. On January 8, Respondent discharged Zhao. Over the next week, Zhao emailed Middick with various “requests” and threats. Middick informed Zhao he was not authorized to respond to her requests. On January 15, Respondent’s attorney sent Zhao a letter requesting she cease all communication with company employees and direct any questions or concerns about her prior employment, or the return of the company’s property, to the attorney.

The General Counsel’s complaint originally alleged that Respondent violated Section 8(a)(1) of the National Labor Relations Act (“Act”) by: (1) interrogating Lu, and (2) discharging Zhao. At the hearing, the General Counsel moved to amend the complaint to allege that Respondent also violated Section 8(a)(1) by prohibiting Zhao from communicating with company employees. For the reasons stated below, I recommend dismissing each of these allegations.

¹ Abbreviations are as follows: “Tr.” for transcript; “Jt. Exh.” for Joint Exhibits; “GC Exh.” for General Counsel’s Exhibits; “R. Exh.” for Respondent’s Exhibits. Although I have included certain record citations to highlight particular testimony or exhibits, my findings and conclusions are based on my review and consideration of the entire record.

² All dates refer to 2021, unless otherwise stated.

PROCEDURAL HISTORY

5 Zhao filed the unfair labor practice charge in this case on about January 22 and amended it on about May 24. On June 11, the General Counsel issued the complaint.³ Respondent timely answered, denying the alleged violations and raising affirmative defenses. This hearing was held by video on August 23-25, due to the compelling circumstances caused by the ongoing COVID-19 pandemic. At the hearing, all parties were afforded the right to call and examine witnesses, present any relevant documentary evidence, and argue their respective legal positions.⁴ The General Counsel and Respondent filed post-hearing briefs, which I have carefully considered.⁵

MOTION TO AMEND

15 As stated, the General Counsel moved to amend the complaint to allege the January 15 letter from Respondent's attorney violated Section 8(a)(1). (GC Exh 18) (Tr. 397-399). Respondent orally opposed the motion. I reserved ruling to allow the parties an opportunity to brief the propriety of the motion and its merits. Upon reviewing the matter, I grant the General Counsel's motion.⁶

20 Section 102.17 of the Board's Rules and Regulations affords the judge wide discretion to grant complaint amendments "upon such terms as may be deemed just" during or after the hearing until the case has been transferred to the Board. See *Folsom Ready Mix, Inc.*, 338 NLRB 1172 fn. 1 (2003). In making this decision, the judge should consider: (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated. *Rogan Bros. Sanitation, Inc.*, 362 NLRB 547, 548 fn. 8 (2015), enf. sub. nom. 651 Fed.Appx. 34, 35-36 (2d Cir. 25 2016). Here, the General Counsel first learned of the letter when Respondent produced subpoenaed documents a week before the hearing, and the General Counsel moved to amend shortly after reviewing

³ In her opening statement, the General Counsel stated the Region initially dismissed Zhao's charge after finding she had not engaged in concerted activity. Zhao appealed the dismissal and provided two audio recordings she secretly made: one of a conversation with Lu and the other of a conversation with Middick (both discussed below). Based on those recordings, the Region reversed itself and issued the complaint. (Tr. 20-21).

⁴ Respondent subpoenaed Zhao to produce certain documents at trial, and the General Counsel petitioned to partially revoke portions of that subpoena. Prior to the hearing, I held conference calls with the parties, including Zhao, to discuss the matter. I tentatively granted portions of the petition to revoke and ordered Zhao to produce the remaining documents. At trial, Zhao failed to turn over all the documents I had ordered produced. Zhao claimed she did not understand my rulings because she was not fluent in English and was confused. However, during the calls, I directly asked Zhao multiple times whether she had any questions about my rulings, and she did not.

Respondent moved to compel production of those documents, which I partially granted. The documents at issue include Zhao's financial documents, such as W-2s, tax filings, tax returns, etc., which I found had probable relevance to the credibility concerns Respondent raised, including whether Zhao intentionally misrepresented her prior employment and work experience. Zhao failed to comply with that order, but no further action was taken. Based upon the record, as well as my credibility findings, Respondent was not prejudiced in any material way by Zhao's non-compliance with these orders.

⁵ Respondent's attorney filed a response to the General Counsel's motion to amend the complaint and a motion to dismiss the complaint, which I collectively treat as Respondent's post-hearing brief.

⁶ In General Counsel's motion to amend (GC Exh. 18), which I receive into evidence, she seeks to amend paragraph 3 of the complaint to allege that at all material times, Alison L. Battiste was the attorney for Respondent and its agent within the meaning of Sec. 2(13) of the Act. The General Counsel also moves to amend in paragraph 6(c) of the complaint to allege that on or about January 15, Respondent, by Alison Battiste, wrote that an employee was requested to immediately cease and desist all communications with any owner or employee of Respondent. (GC Exh. 18). This conduct is alleged to violate Sec. 8(a)(1) of the Act. Respondent does not dispute that Battiste is a Sec. 2(13) agent.

those documents.⁷ There was no surprise or lack of notice on the part of Respondent because its counsel wrote and sent the letter at issue to Zhao. The matter also was fully litigated. The General Counsel made the motion at the end of her case-in-chief, and she fully articulated her theory regarding the alleged violation before Respondent presented its defense. Respondent had ample time to evaluate the motion and prepare its defense to the allegation. I gave Respondent's counsel additional time and wide latitude to question witnesses and present documentary evidence. This included recalling Zhao to question her about the letter and introducing correspondence to provide the context in which that letter was sent.

Section 10(b) of the Act requires that unfair labor practice charges be filed and served within six months of or after the allegedly unlawful conduct. However, a complaint may be amended to allege conduct occurring outside the 10(b) period if it occurred within six months of a timely filed charge and is "closely related" to the allegations of the charge. *Redd-I, Inc.*, 290 NLRB 1115 (1988). Under *Redd-I*, the Board considers whether: (1) the otherwise untimely allegations involve the same legal theory as the allegations in the timely charge; (2) the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge (i.e., the allegations involve similar conduct, usually during the same time period, and with a similar object); and (3) a respondent would raise the same or similar defenses to both the otherwise untimely and timely allegations. *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1203 (2014). In applying these factors, I conclude the amended allegation regarding the January 15 letter is closely related to the timely filed allegations contained in the complaint. They all concern alleged violations of Section 8(a)(1), and they arise out of the events the week surrounding Zhao's discharge. Additionally, Respondent defends both the alleged January 5 interrogation of Lu and the January 15 letter to Chen as having no reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

FINDINGS OF FACT⁸

A. Jurisdiction

Respondent is a Missouri corporation with its principal office and place of business in Joplin, Missouri, where it has been engaged in the business of selling batteries wholesale. In conducting its business operations annually, Respondent derived gross revenues in excess of \$1,000,000, and purchased and received at its Joplin facility, goods and materials valued in excess of \$50,000 directly from points

⁷ Zhao testified she could not recall whether she provided a copy of the January 15 letter to the Region during the investigation. Respondent argues it has no way to probe the veracity of that testimony because of Zhao's failure to completely respond to Respondent's subpoena, including requests that would encompass the letter and its submission to the Region. Whether Zhao had a copy of the letter and failed to provide it to Respondent has little bearing on whether Zhao informed the Region about it prior to the hearing. Nonetheless, I credit the General Counsel's representation as an officer of the court that she searched the Region's case file and confirmed it did not learn of the letter until Respondent produced subpoenaed documents a week before the hearing began.

⁸ The Findings of Fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as in conflict with credited evidence or because it was incredible and unworthy of belief. In assessing credibility, I primarily relied upon witness demeanor. I also considered the context of the witness's testimony, the quality of their recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd. sub nom.*, 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, *supra* at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), *rev'd. on other grounds* 340 U.S. 474 (1951)). Where necessary, specific credibility determinations are set forth below.

outside the State of Missouri. Respondent admits, and I find, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. Alleged Unfair Labor Practices

1. Background

Respondent is a subsidiary of a company headquartered in Shenzhen, China called the Vision Group, which produces the batteries that Respondent sells to customers in North America. At all material times, Respondent has had a total of four employees: Chen, Lu, Middick, and Zhao.⁹ Chen, Lu, and Zhao work(ed) remotely from their homes in the Dallas, Texas area. Middick primarily works from Respondent's Joplin facility. Respondent's employees regularly communicate with one another, as well as with employees of the Vision Group, over the telephone, email, and WeChat messaging. Chen, Lu, and Zhao speak Mandarin Chinese and some English; Middick only speaks English.

Chen hired Zhao on December 8, 2020 to be Respondent's senior accountant. She was hired to replace the financial controller, Freya Fan, who Chen later discharged because of performance issues. In the interim, Chen instructed Zhao not to communicate with Fan. Chen was concerned Fan may destroy company information if she learned she was being replaced.

Middick was Zhao's immediate supervisor and primarily responsible for training her. Because of COVID, Zhao's training was done remotely. She and Middick communicated regularly, and Middick told Zhao to come to him if she had any questions or needed assistance.

Zhao officially began performing her duties as senior accountant on December 21. She received full access to Respondent's files and client accounts. However, she never received an employee manual or other documents regarding Respondent's policies, procedures, or benefits.

2. Phone Conversation Between Chen and Zhao

On January 5, at 9:28 a.m., Chen called and asked Zhao (in Mandarin) to provide him with an updated Excel document he needed for one of the company's largest customers. Chen had trained Zhao multiple times about this document shortly after she began working at the company. Zhao, however, was unable to produce the document Chen had requested. Chen explained again what he was looking for and where on the computer system she should look to find it. Zhao still was unable to produce the document. Out of frustration, Chen uttered the Mandarin expletive "ma de," which is equivalent to saying "damn" in English.¹⁰ Zhao took offense and began yelling at Chen. She stated (translated into English), "You are over fifty years old, and you are a sitting manager of the company. How could you use dirty words with me?" (Tr. 583). Chen tried to explain she misunderstood him, but Zhao would not listen. She continued to yell

⁹ Chen is a supervisor and agent of Respondent, and Middick is an agent. (GC Exh. 1)(Tr. 18-19).

¹⁰ "Ma de" is short for "ta ma de." Neither has an exact English translation. Lu testified "ma de" was equivalent to saying an angry curse word like "shit" or "damn." (Tr. 335). Zhao testified she believed it was more like saying "fuck" or "fuck it." (GC Exh. 5). At the hearing, the interpreter provided her opinion that it was closer to "damn." (Tr. 148). Although the meaning is not critical, I accept the interpreter's opinion as both informed and objective.

and accuse him of using “vulgar” language. She then hung up on him.¹¹ Their conversation lasted about three minutes. (GC Exh. 4).¹²

At 9:35 a.m., Chen sent Zhao a WeChat message stating (translated into English by the interpreter), “I said ‘ma de.’ If you said this is vulgar, I have nothing more to say.” (Tr. 78). Zhao did not respond.

3. Messages Between Zhao, Middick, and Lu

At 9:36 a.m., Zhao sent a message (in English) to Lu and Middick. She wrote “Just FYI. This morning Darren said dirty word on the phone to me, there is a chance I might leave my position anytime if he didn’t apologize for this behavior and keep my right to pursuit all his responsibilities.” She sent another message a few minutes later, in which she wrote “Sorry for the all the related inconvenience, thanks all the help.” Middick responded back, “Understood!” Lu responded, “I am sorry to hear that Grace. You dont deserve this!” Zhao responded, “Thanks for the understanding, at least I need formal written apologize from Darren.” Lu responded by asking Zhao if she told Chen she wanted him to apologize. Zhao answered, “He should be well aware of that before more severe responsibility.” (Jt. Exh. 3). Zhao did not explain what she meant by this comment.

4. Phone Conversation Between Lu and Zhao

At about 11:47 a.m., Lu called and spoke to Zhao. The two had met before but did not have regular interaction. Lu testified she called Zhao to find out what happened and to offer Zhao emotional support because she was new to the company and likely had no one else with whom to talk.¹³ They spoke (in Mandarin) for about 30 minutes. After about 8 minutes, Zhao secretly began recording their conversation.¹⁴ The recording and a transcript (in both Mandarin and English were introduced into evidence. (Jt. Exh. 5).¹⁵

The start of their discussion, which is not part of the recording, covered Zhao’s conversation with Chen. The recorded portion began with Zhao complaining about the training that she had (not) received.

¹¹ I found Chen to be a largely credible witness even though his recollection was, at times, limited. I generally credit his testimony regarding this conversation as it was clear and consistent, likely because of how “embarrassing” it was, as this was the first time an employee yelled at him and hung up on him. (Tr. 577, 615).

¹² I credit Chen’s testimony as both reasonable and logical that immediately after this call with Zhao he determined that neither he nor she would have success if she remained as an employee, and she likely needed to be discharged. I further credit he made this decision based on her inability/failure to perform the assigned task and her reaction during the call, including yelling and chastising him for using vulgar language, hanging up on him, and failing to respond to his WeChat message. (Tr. 586-587).

¹³ I found Lu to be a highly credible witness. She appeared truthful and forthright in her demeanor, and she testified consistently and convincingly on both direct and cross examination. Her testimony also was largely consistent with the affidavit she gave during the investigation. I was particularly impressed by her candid responses regarding her reaction to learning that Zhao had secretly recorded their conversation, and that Chen later listened to the recording just prior to the hearing. But her feelings of embarrassment and irritation did not appear to affect her testimony or cause her to give responses favoring Chen in an effort to protect her continued employment.

¹⁴ In general, I did not find Zhao to be a credible witness. It was difficult to differentiate between her emotional reaction to events and her factual recollection of them. Her recall was at times selective and self-serving; her responses on cross-examination were often evasive, non-responsive, or argumentative; and her demeanor was guarded and unbelievable. In this situation, Zhao testified she secretly began recording her conversation with Lu because she believed Respondent was engaged in illegal practices. (Tr. 130). Zhao never specified what those alleged illegal practices were or, more importantly, how she believed Lu was involved or aware of them.

¹⁵ To the extent there is any conflict, I give no weight to the transcript the General Counsel introduced based on Zhao’s translation (from Mandarin to English) of what was said during her conversation with Lu. (GC Exh. 5). I find the transcript prepared by the certified interpreter to be far more credible and reliable than one prepared by Zhao, who admittedly is not fluent in English.

She stated Chen and Middick emailed her documents, some of which she could not understand, and told her to perform tasks without giving her any instructions. She also stated Chen failed to timely respond when she emailed him with questions. Lu stated that was how Chen was, “He is very stingy. He does not want to tell you what he knows. He wants you to figure it out yourself.” (Jt. Exh. 5, pg. 1). Zhao then explained she had only recently been given access to Fan’s email to review documents to help in performing her job. Lu stated she had similar issues when she started and had to learn from the customers. Lu said, “Your feelings ... are justified, and there is nothing wrong with it. This is to say that we all know what Darren is like.” (Jt. Exh. 5, pg. 3). Lu also told Zhao she previously resigned from the company, in part, because of her frustration with Chen’s management style, but she later returned because she liked the job’s flexible work schedule. Lu added that she now speaks up for herself when talking with Chen, and that has improved how Chen approaches her. But she acknowledged that Chen “gets too emotional” and that it is “not professional.” (Jt. Exh. 5, pg. 5). The conversation then turned to Middick. Lu said that Middick thinks many of the things Chen does are weird, but he does not speak up because he plans to retire soon and needs to keep his job.

Lu later said, “I just want to tell you to let you know the overall situation, so you can better understand the current situation you are in and why he [Chen] said such things.” (Jt. Exh. 5, pg. 7). Lu went on to call Chen “narrow-minded,” “very hostile,” and “insecure.”

Zhao talked about how she was not permitted to speak to Fan when she started working at the company. Lu said that was the company’s standard procedure because Chen was concerned that Fan might delete company documents if she found out she was being replaced. Lu then commented about two others who quit in recent years, and she blamed Chen for them leaving because he would not give them credit for the work they did. Lu also said, “But my feelings toward this incident about how he treats you this way, Freya left like this, he cannot play around like this any longer...” (Jt. Exh. 5, pg. 11). Lu then said she would talk to Kevin Hahn, stating “I think [he] needs to know certain things. Such a big problem here in the US, a company without someone in charge of finance, but because of him, this cannot be dealt with soon. He needs to shoulder the responsibility.” (Jt. Exh. 5, pg. 11).¹⁶ Zhao agreed.

The two then returned to discussing Zhao’s training, and how Chen does not teach employees how to perform their jobs and does not respond to questions, and it was wrong for him to act that way. (Jt. Exh. 5, pg. 12). Lu told Zhao that if she had any questions, or there was anything she did not understand, Zhao should ask her, even though Lu acknowledged she did not know much about the finances on Zhao’s side of the company. (Jt. Exh. 5, pg. 13).

Lu also commented on Zhao’s message that she might resign if Chen did not formally apologize to her for what he said on the telephone. Lu said it was unlikely Chen would apologize. Zhao responded that she knew that. Lu then told Zhao she should rethink her plan to resign if Chen did not apologize to her. (Jt. Exh. 5, pg. 13). Lu later told Zhao, “Contact me if you have any questions. No matter what you do, I will support you.” (Jt. Exh. 5, pg. 15). Zhao responded, “[A]fter talking to you, now I can figure it out better. Thank you!” (Jt. Exh. 5, pg. 15). Lu concluded by telling Zhao not to take what Chen says personally. She told Zhao she had experiences when Chen would curse, but it was at the situation, not at her. That was essentially the end of the conversation

¹⁶ Kevin Hahn’s position and authority is unclear. Chen was asked who Hahn was, and he believed Hahn was a sales manager at the parent company. (Tr. 50). Later, when asked who oversaw him at the parent company, Chen said “Mr. Hahn, the CEO, my boss of this company.” (Tr. 53). Chen’s responses suggest two different people because otherwise there would be no reason to identify Kevin Hahn as a sales manager, and not the CEO. Furthermore, when Lu was asked if she believed Kevin Hahn would be able to “fix” Chen’s behavior, she said no because Chen held a higher position than Hahn. (Tr. 348-349). In the absence of clearer evidence, I reject the General Counsel’s argument that Chen reports to Kevin Hahn.

5. Zhao's Message to Chen Demanding Formal Apology

5 While Zhao and Lu were talking, Chen called Zhao but did not leave a message. (GC Exh. 4). At 12:51 p.m., after Zhao got off the phone with Lu, she sent Chen a message (in English) stating, "I was on the phone with Alex [meaning Alice] when you called. you need a formal apology for your wrong behavior. I had been very patient so far even though there were already enough evidence and witness of the harassment in the current working environment leading to potential legal involvement." (Jt. Exh. 2).¹⁷ Zhao
10 did not discuss or share this text with anyone prior to sending it.¹⁸

After receiving this message, Chen immediately began looking for an attorney because he interpreted it as threatening litigation. (Tr. 589, 591, 593-596) (R. Exh. 29). Prior to this point, Chen had never needed an attorney to represent the company and needed a referral. By 1:52 p.m., Chen had obtained
15 a referral and began communicating with the law firm he retained to represent the company. (R. Exh. 30).¹⁹

6. Chen's Conversations with Lu and Middick

At around 1 p.m., Chen called and spoke with Lu in Mandarin.²⁰ He told her about his telephone
20 conversation with Zhao and read from the message Zhao sent to him. According to Lu, Chen spoke as though he had been wronged or misunderstood and wanted to explain what happened and why he said what he said to Zhao. (Tr. 385). When Chen read Lu the portion of Zhao's message about potential legal involvement, Lu responded there was no way there was going to be a lawsuit, and it was not that serious. Chen continued to express concern about Zhao filing a lawsuit. (Tr. 354-355). At some point, Lu
25 volunteered she had spoken to Zhao, and Zhao wanted Chen to formally apologize for what he said. Lu

¹⁷ There is a dispute about the meaning of this text. I find it curious Zhao sent this text in English when she and Chen were fluent in Mandarin, not English, and Chen's earlier messages to Chen were in Mandarin.

¹⁸ Zhao later informed Middick about her message. Middick asked, "Besides a 'dirty word' what harassment are you talking about?" Zhao replied, "I am working every day." She did not identify any other harassment. (R. Exh. 28).

¹⁹ R. Exh. 30 is a series of text messages used to question Chen about his decision to seek out an attorney to advise him on how he should respond to Zhao's message, but that document was not moved into evidence at the hearing. After the record closed, I solicited the parties' positions about receiving the document into evidence, and there was no objection. I, therefore, admit the exhibit into the record.

²⁰ Zhao confirmed she meant Lu. Chen testified he believed Zhao may have spoken with Lu because of this reference to "Alex," and there being no one by that name working for the company. (Tr. 602).

told Chen she thought he should apologize and give Zhao what she wants so they could move forward. (Tr. 362).²¹ Lu did not disclose anything else about her conversation with Zhao. (Tr. 355).²²

5 Chen later spoke again with Middick and told him that Zhao had accused him of using an offensive term. Chen explained to Middick the word he had used, and that he did not say the word out of anger at Zhao, but out of frustration with her inability to produce the requested document when she had been trained multiple times. Chen explained the word “ma de” in Mandarin was something less than “shit” in English. When Chen brought this up, Middick mentioned the message Zhao sent to him and Lu about Chen calling her a “dirty word.” (Tr. 426-427). Middick and Chen spoke again later that day. Chen asked Middick
10 whether he thought Zhao could perform her job correctly, and Middick said he was uncertain. He gave Chen examples of issues he had with Zhao’s performance recently. (Tr. 427-428). Middick did not discuss there performance issues with Zhao prior to discussing them with Chen.

15 On January 7, Chen called Middick and told him to discharge Zhao. According to Middick, Chen stated Zhao was not working out as an employee, and he was frustrated with her. He “lumped” together the way she had behaved toward him after what she felt was dirty words and her performance. (Tr. 442).²³ Chen told Middick he had consulted an attorney after receiving Zhao’s text, and the attorney was preparing a release agreement for Middick to give to Zhao for her to review and sign if she agreed. (Tr. 442-443).

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²¹ Lu provided an affidavit (in English) in February regarding her telephone conversations with Zhao and Chen. Regarding her conversation with Chen, Lu stated:

I recall Darren saying that he wanted some documents from Grace, and Grace was not sure how to do it, and then Darren said [“ma de”]. Darren said that he had taught Grace many times how to do what he was asking her to do, and that he was frustrated by Grace's response. I recall Darren saying that it was his habit of saying that word. I recall telling Darren that Grace needed a formal apology (I was speaking for Grace because Grace had indicated that she wanted a formal apology). I can't recall exactly what Darren said in response, but I recall Darren saying something to the effect that [he] had given Grace an apology.

(R. Exh. 13, pg. 4).

In that affidavit, Lu stated she never told Middick or Chen that she had spoken to Zhao and never told them anything about her phone conversation with Zhao. (R. Exh. 13, pg. 3). The General Counsel attempted to impeach Lu with this after she testified about her conversation with Chen. Lu explained she meant she did not seek out or initiate a conversation with Chen or Middick about her conversation with Zhao, but she also did not want to deceive Chen by not telling him that she had spoken to Zhao about what happened and her demand for an apology. (Tr. 359). As stated, I found Lu to be a credible witness and I credit this explanation.

The General Counsel also attempted to impeach Lu with a statement in her affidavit that “Neither Darren nor Ken questioned me or inquired either verbally or in writing about whether I had a conversation with Grace on that date, or at any other time.” As Lu pointed out, these statements are accurate and not inconsistent with her testimony because neither questioned her about Zhao. She *volunteered* the information while talking to Chen. (Tr. 360).

²² The General Counsel asked Lu why she did not want to have this conversation with Chen about Zhao. Lu answered:

[I]t's not I didn't want to have a conversation... [I]f he wants to talk to me I can talk. I just think it's inappropriate for me to call Darren about this because it's between [Zhao] and Darren. It's nothing about me. So I have no obligation or responsibility to go talk to my boss about this. But if he'd call me then I need to tell him the things that we talked – I feel I need to be honest with him.

(Tr. 358-359).

²³ I generally found Middick to be a credible witness. He had an honest and straightforward demeanor and largely provided consistent testimony. Although he struggled at times to recall certain details, I find it was not out of an effort to deceive, but rather because his attention at the time of these events was focused on his work. I also credit Middick did not confront Zhao about her performance issues because he wanted to remain positive and encouraging. Setting aside whether this is an effective training strategy, I find from Middick’s demeanor and apparent aversion to confrontation that this is why he never directly informed her or was critical about the issues with her performance.

7. *Notice of Discharge and Discharge Letter*

On the morning of January 8, Middick spoke with Zhao over the telephone to inform her about her discharge. The conversation was in English. Unbeknownst to Middick, Zhao recorded their conversation. A transcript of that recording was introduced into evidence. (GC Exh. 14(b)).

Middick began by telling Zhao that Chen had decided to discharge her employment. Middick reported that Chen took the message Zhao sent him to an attorney to find out what recourse he had. The attorney told Chen to discharge Zhao's employment and not talk to her anymore. Chen then instructed Middick to call Zhao to inform her of her discharge and to explain the next steps. Middick first explained the company wanted Zhao to review and sign a release agreement that he would be forwarding to her. He also told her to return her company computer and any other materials to Respondent's attorney's office. After those items were returned, Middick would issue Zhao's final paycheck. If she signed the release agreement and did not revoke it, then Middick would issue her a second check for \$1500.

Middick later emailed a discharge letter to Zhao's personal email account. The letter stated the reason for the discharge was "for not being the work fit that we need at this time." The letter also included a copy of the release agreement and instructions for how Zhao was to return all company property to Respondent's attorney. (Jt. Exh. 4).

8. *Post-Discharge Communications*

On January 8, after the decision to discharge was made, Zhao emailed Chen (in English), copying Middick, requesting that Chen take the following steps:

1. Issue a formal apology due to your dirty comment assault behavior and make sure the same or any similar kinds will not happen again.

2. Fulfill employer responsibility for all the compensation items including insurance and so on specified per the employment contract which had not been clarified or confirmed in any kind so far after it had carried on for a month.

3. Unify the pay period equal or less than 2 weeks interval for everyone to avoid a discrimination lawsuit.

4. Pay overtime working hours lately for everyone due to your own misconduct in handling the business and inefficient working procedure and stopping issue query during late evening and golfing during normal working hour.

5. Pay personal resources you already took advantage of for business usage, e.g., phone services and extra help beyond working scope carry heavy stuff and helping the transfer which supposed to be your own business.

Further, to minimize the damage to yourself and the business, I would also suggest doing compensation to all former employee whoever had been treated unfairly and illegally to avoid multiple lawsuit cases against you and jeopardize future business.

(GC Exh. 15).

There was no response to this email. On January 11, Middick emailed Zhao reminding her to return all company equipment and materials to Respondent's attorney as soon as possible, and that continuing to hold onto those items may be considered theft. (R. Exh. 22). Two hours later, Zhao emailed Middick (in English) that there was no procedure given to her for returning those items, and she preferred to mail the items back. She also stated the company had not responded to any of her requests in her January 8 email "to settle the assault event." (R. Exh. 22). An hour later, Middick emailed Zhao, quoting the instructions from her discharge letter for returning the company's property to Respondent's attorney. At about 6:34 p.m., Zhao sent an email reply criticizing Middick for combining the instructions for returning company property in the same letter with the procedure for reviewing and executing the release agreement, and for sending the letter to her personal email address. At the end, Zhao again urged Middick to address "the requests" made in her January 8 email. (R. Exh. 22).

On January 12, at about 11:10 a.m., Middick emailed Zhao giving her the option of mailing the company property back or having Respondent's attorney send someone to her house to pick it up. He asked her to let him know what option she chose. (R. Exh. 23). At 4:32 p.m., Zhao responded that she wanted to have the items picked up from her home. She also stated the attorney needed to identify, in advance, all the property they would be picking up from her, and the person would need to sign certifying that she had returned all the property. She concluded by stating she was still awaiting a response to "the requests" listed in her January 8 email. (R. Exh. 23).

On January 13, at 11:47 a.m., Middick emailed Zhao to propose having a third-party courier come to her home to pick up the company's property. (R. Exh. 24). He stated the company would not be able to provide her with a list, in advance, of all the property the courier would be picking up because it did not know all of what was in her possession. To be safe, Middick instructed Zhao to return all the property related to the company and the work she performed. Middick also said the courier would not be able to certify she returned everything because they would not know all of what she has. He suggested that Zhao prepare a log with all the items she was returning. He concluded the email by informing Zhao he "was not authorized to respond to any of [her] other requests." (R. Exh. 24).

At 3:42 p.m., Zhao sent an email objecting to the use of a third-party courier service and accusing Middick of going back on what they had agreed. (R. Exh. 24). She again demanded the company provide a list of items to be returned and then have the courier certify she returned all items. Zhao set forth a procedure she demanded be followed. She then stated that if this procedure could not be agreed to, she would report the matter to the parent company in China "for them to evaluate and audit the misconduct and poor administration" of the company "leading to all kind of negative impact on the business from all perspectives as well as [the violation of state law]." (R. Exh. 24).

On January 15, at 9:46 a.m., Respondent's attorney, Alison Battiste, through her assistant, emailed Zhao a letter addressing her continued failure to return all company property in her possession. The letter states "It is now clear that you are intentionally being obstinate and willfully refusing to comply with your duty to return VBU's property. Your unauthorized use or retention of VBU's property is a violation of Texas law and you now may be liable for civil theft and civil conversion." She warned that if Zhao did not immediately return all property to Battiste's office by January 28, the company reserved the right to take legal action. Battiste also wrote, in a separate paragraph: "Finally, you are requested to immediately cease and desist all communication with any owner or employee of VBU. If you have further questions or concerns regarding your former employment at VBU or VBU's property, please direct them to me." The letter concludes by stating it is not intended to be an election of remedies, and that the company reserves the right to seek all available remedies and relief. (GC Exh. 17). Despite this request, on January 18, Zhao emailed Middick and Chen threatening to file wage claims over Respondent's failure to issue her last paycheck. (R. Exh. 27).

LEGAL ANALYSIS

A. Interrogation

5 The General Counsel alleges Chen violated Section 8(a)(1) of the Act when he interrogated Lu during their January 5 telephone conversation about her and other employees' protected concerted activities.²⁴ In assessing whether an employer engaged in unlawful interrogation, the Board applies the "totality of circumstances" test adopted in *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub
10 nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). This test involves a case-by-case analysis of various factors set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964), including: the background, i.e., whether the employer has a history of hostility toward or discrimination against protected activity; the nature of the information sought; the identity of the interrogator, i.e., his or her placement in the employer's hierarchy; the place and method of the interrogation; and the truthfulness of the interrogated employee's
15 reply. *Healthy Minds, Inc.*, 371 NLRB No. 6, slip op. at 4 (2021); and *Kumho Tires Georgia*, 370 NLRB No. 32, slip op. at 6, fn. 14 (2020).²⁵ These factors are not to be mechanically applied and it is not essential that each element be met. The key inquiry is whether overall the questioning would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. This is an objective standard, and not based on the subjective reaction of the employee. *Multi-Aid Service*, 331 NLRB 1126
20 (2000), enf. 255 F.3d 363 (7th Cir. 2001).

In considering the totality of the circumstances, I find Chen did not unlawfully interrogate Lu. As discussed, on January 5, Chen called Lu and read her portions from Zhao's message. From Lu's perspective, Chen felt wronged or misunderstood by Zhao's accusations and concerned about her threat of
25 litigation. He explained to Lu what happened during his conversation with Zhao and why he said what he said to her. Contrary to the General Counsel's assertions, Chen did not question Lu or otherwise attempt to elicit information from her about her or any other employee's protected concerted activity. He also did not attempt to gauge Lu's sympathies or try to uncover who "witnessed" his allegedly harassing behavior.

30 As to the *Bourne* factors, although Chen is Lu's direct supervisor and the highest-ranking company official, the two have worked together at this four-person company for several years. They communicate regularly, including over the telephone. Lu also testified she felt comfortable speaking her mind when talking to Chen, even disagreeing with him. In this instance, Lu testified she did not seek out Chen to tell him about her conversation with Zhao because she considered the matter to be between Zhao and Chen and
35 had nothing to do with her. But she resisted the General Counsel's attempts to characterize her as "uncomfortable" talking to Chen about it. I find Lu spoke freely and honestly while talking with Chen, including volunteering that she spoke with Zhao and told Chen he should apologize to her so they could move forward. Finally, I reject the General Counsel's contentions that Chen's comments would reasonably tend to coerce Lu, or cause her to fear for her job, based on his control over her and his "past retaliatory actions taken against other employees." There is no evidence Chen previously retaliated against any
40 employee for raising collective concerns or engaging in other statutorily protected activities.

Based on the foregoing, I conclude Chen's conversation with Lu did not violate Section 8(a)(1).

²⁴ Section 8(a)(1) prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Section 7 affirmatively states employees have "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ..."

²⁵ The Board has found that an unlawful interrogation need not be face-to-face. *RHCG Safety Corp.*, 365 NLRB No. 88, slip. op. at 2 fn. 4 (2017) (text message) (citing to *McGlaughlin v. NLRB*, 652 F.2d 673, 674 (6th Cir. 1981) (coercive interrogation occurred via a phone call)).

B. Zhao's Discharge

1. *Legal Standard and Framework*

The General Counsel next alleges Respondent violated Section 8(a)(1) when it discharged Zhao because she engaged in Section 7 activity. When assessing the lawfulness of an adverse employment action that turns on employer motivation, the Board applies the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved by *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983). Under *Wright Line*, the General Counsel must initially show that: (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the adverse action and the Section 7 activity. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 6, 8 (2019); see also *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 1-2 (2020). Animus can be established through direct evidence or inferred from circumstantial evidence. See *Medic One, Inc.*, 331 NLRB 464, 475 (2000) (evidence supporting an inference of animus and discriminatory motivation includes suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, disparate treatment of the discharged employees, and shifting defenses). To support its burden, the General Counsel must prove the animus was a substantial or motivating factor for the adverse action. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), *enfd.* 577 F.3d 467 (2d Cir. 2009).

If the General Counsel establishes these factors, the burden shifts to the employer to show it would have taken the same action in the absence of the employee's protected activity. *Wright Line*, 251 NLRB at 1089. An employer cannot simply present a legitimate reason for its action; rather, it must persuade by a preponderance of the evidence that the same action would have taken place in the absence of the protected conduct. See *Bruce Packing Co.*, 357 NLRB 1084, 1086-1087 (2011), *enfd.* in pertinent part 795 F.3d 18 (D.C. Cir. 2015); *Consolidated Bus Transit*, 350 NLRB at 1066; *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), *review denied* 70 F.3d 863 (6th Cir. 1995), *enfd.* mem. 99 F.3d 1139 (6th Cir. 1996)). The General Counsel may also offer proof that the employer's reasons for the personnel decision were false or pretextual. When the employer's stated reasons for its decision are found to be pretextual -- that is, either false or not in fact relied upon -- discriminatory motive may be inferred but such an inference is not compelled. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019).

2. *Zhao Was Not Engaged in Protected Concerted Activity*

The first issue is whether Zhao engaged in any known or suspected Section 7 activity prior to her discharge. To qualify, the activity must be both "concerted" and engaged in for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). "[W]hether an employee's activity is 'concerted' depends on the manner in which the employee's actions may be linked to those of his coworkers.... The concept of 'mutual aid or protection' focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'" *Id.* (internal citations omitted).

Activity is "concerted" if it is engaged in with or on behalf of other employees and not solely by and on behalf of the employee himself or herself. See also *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 948 (1985), *on remand Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), *affd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988). An employee's subjective reason for engaging

in the activity is irrelevant to whether it is concerted; the Board applies an objective standard to determine concertedness. *Circle K Corp.*, 305 NLRB 932, 933 (1991), enf. mem. 989 F.2d 498 (6th Cir. 1993). Also, an employee need not secure another's agreement on a course of action for the activity to be concerted. Id.

5 A single employee may be engaged in concerted activity if he/she seeks "to initiate or induce or to prepare for group action" or brings "truly group complaints to the attention of management." *Marburn Academy Inc.*, 368 NLRB No. 38, slip op. 10 (2019), citing numerous authorities. This includes preliminary discussions related to contemplated or planned group action, regardless of whether that action comes to fruition. *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). Cf. *Kingman Hospital, Inc.*, 363 NLRB No. 145 (2016). However, concerted activity does not include griping or activities of a purely personal nature that do not envision group action. See *Quicken Loans, Inc.*, 367 NLRB No. 112, slip op. at 3 (2019) (employee's profanity-laced statement in public bathroom regarding a customer call routed to him in the presence of another employee and supervisor did not amount to protected concerted activity as there was no evidence that the employee had any preexisting concerns on the matter and did not seek to initiate or induce group action); *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 1 (2019) (individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor). See also *Mushroom Transportation Co., Inc. v. NLRB*, 330 F.2d at 685 (court held "a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees... Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. . . [I]f it looks forward to no action at all, it is more than likely to be mere "griping.").

25 In *Fresh & Easy*, supra, the Board majority held an employee engaged in protected concerted activity when she, in support of her sexual harassment complaint, asked coworkers to sign her handwritten reproduction of an offensive whiteboard message posted in the breakroom. The majority found her solicitation of assistance was "concerted," even though the coworkers were annoyed by her request and did not support her complaint. 361 NLRB at 153. It also found her activity was for "mutual aid or protection" based on the "solidarity principle," which states coworkers have an interest in helping an aggrieved employee even if that employee is the only one with an immediate stake in the outcome because "next time it could be one of them that is the victim." Id. at 156.

35 The General Counsel argues that Zhao engaged in protected concerted activity by seeking support, guidance, and common cause with her coworkers to create a less abusive work environment, and Respondent had knowledge of that activity through the wording of her text message to Chen, and from Chen's subsequent conversations with Lu and Middick regarding Zhao's message. After reviewing the totality of the evidence, I reject these arguments and find the General Counsel has failed to meet her burden.

40 In reviewing the objective evidence, I conclude Zhao's activities were purely personal, focused solely on getting Chen to apologize to her for using an expletive during their one-on-one telephone conversation. As discussed, Zhao messaged Lu and Middick that Chen called her a "dirty word" and she might resign if he did not apologize to her. However, unlike in *Fresh & Easy*, Zhao did not ask Lu or Middick for any help, and neither of them read her messages as such. Nothing in the communications suggest Zhao was initiating, inducing, or preparing for group action, or was trying to bring truly group complaints to the attention of management. Nor do the communications suggest they had mutual aid or protection as their purpose.

50 Lu later called Zhao. The two spoke for nearly 30 minutes, venting about Chen and his management style, particularly how he fails to properly train, recognize, and communicate with employees. Lu told Zhao she was troubled by this and planned to notify Kevin Hahn because he needed to know this

was occurring. While in the abstract this plan to notify Hahn could qualify as protected concerted activity, the record does not establish who Hahn is, or what Lu intended to accomplish by speaking to him. Without more, this evidence does not establish whether this conversation between Lu and Hahn, assuming it ever happened, was mere talk or intended to initiate or induce group action for mutual aid or protection.

Lu then addressed Zhao's training and her demand for an apology. As for the former, Lu recognized Chen was not likely to help Zhao learn her job, and she told Zhao to come to her for help if she had questions. As for the latter, Lu told Zhao it was unlikely Chen would apologize for what he said to her, but she urged Zhao to reconsider her plan to resign. Toward the end of the conversation, Lu told Zhao "Contact me if you have any questions. No matter what you do, I will support you." Zhao responded, "[A]fter talking to you, now I can figure it out better. Thank you!" (emphasis added). Again, I find no group action was initiated, planned, or contemplated during this conversation for employees' mutual aid or protection. See *Quicken Loans, Inc.*, supra slip op. at 3 (activities of a purely personal nature that do not envision any group action are not protected).

The General Counsel further argues Zhao's text to Chen was protected concerted activity because it was sent after Zhao learned from Lu that Chen allegedly had a practice of using foul language and of bullying employees with unreasonable demands. I find no objective evidence that Zhao sent this message with the intent of advocating for anyone but herself. In the text, Zhao demanded a formal apology stating, "I had been very patient so far even though there were already enough evidence and witness of the harassment in the current working environment ..." The General Counsel argues Zhao's use of "witness of the harassment" signaled to Chen that she was raising collective concerns and speaking on behalf of others.²⁶ In *Alstate Maintenance*, the Board rejected this argument where a skycap complained to a supervisor in the presence of coworkers about customer tips, using the word "we" to suggest a collective concern. Citing to *Meyers I* and *II*, the Board held that "individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural pronoun." 367 NLRB No. 68, slip op. at 7.²⁷ Here, Zhao's comments were even less concerted because they were not made in the presence of, or attributed to, any other employee. Additionally, the only "harassment" Zhao raised with Chen was over his "vulgar language" during their telephone conversation, for which there were no other witnesses. Overall, nothing in Zhao's message suggests the personal concerns she raised with Chen during their conversation had evolved into collective concerns by the time she sent him her text message.²⁸

As for knowledge, the General Counsel argues Chen had knowledge of or regarded Zhao as engaging in protected activity after Lu and Middick informed him that Zhao had communicated with them about her demand for an apology, and certainly after Lu told Chen she believed he should apologize to Zhao. From this, the General Counsel argues Chen knew "a support system now existed with employees speaking on behalf of each other." I reject this argument. As discussed, when Chen told Lu about Zhao's message, Lu expressed disbelief, stating there was no way this would result in a lawsuit because what Chen said was not that serious. It was after Chen continued to express concern about a possible lawsuit that Lu

²⁶ On page 28 of her brief, the General Counsel misrepresents Zhao's text, stating that it referenced "other witnesses."

²⁷ In *Alstate Maintenance*, Member (now Chair) McFerran dissented, finding the employee's remark reasonably would have appeared to be for the purpose of initiating a group objection by the skycaps regarding their tips because of how it was conveyed, and the employer regarded his remark as intending to induce group action when it made the discharge decision. 367 NLRB No. 68, slip op at 11. The same cannot be said here. Zhao's demand was not made in the presence of, or with reference to, any other employee, nor did Chen regard it as intending to initiate or prepare for group action when he made the decision to discharge her.

²⁸ The language about enough evidence and witness of the harassment arguably could be read as referring to matters beyond Chen's language during his conversation with Zhao, but objectively her demand for an apology only relates to that language, and only for herself, and not over the other complaints she and Lu discussed about Chen.

told him he should give Zhao what she wants and apologize so they could move forward.²⁹ The objective evidence does not establish Chen knew or believed Lu was speaking on behalf of Zhao, or that Zhao was raising concerns shared by others, for their mutual aid and protection. Additionally, aside from discussing Zhao's desire for an apology, Chen had no knowledge about the other concerns Lu and Zhao shared during their conversation until just prior to the hearing when he first listened to the recording.

Accordingly, I find that, prior to her discharge, Zhao was advancing a personal as opposed to a collective concern and she was not engaging in activity for the purpose of mutual aid or protection, and Respondent did not regard her as such.

3. *Zhao Was Not Discharged for Protected Concerted Activity*

Although my finding that Zhao was not engaged in protected concerted activity ends the matter, I will address the issue of motivation in the event the Board disagrees with that finding. The General Counsel argues animus should be inferred from the timing of Zhao's discharge a few days after communicating with her coworkers and sending Chen her text message demanding a formal apology. Animus may be inferred from timing when there is no other legitimate explanation for the adverse action. Here, however, I have credited that Chen's decision to discharge Zhao began immediately after the call when she could not produce the requested document, yelled at and hung up on him, and refused to respond to his message, all before any of the purported protected concerted activity. Chen's decision to discharge was reinforced after he spoke with Middick about Zhao's performance and the likelihood she would have success remaining at the company. After receiving Zhao's text message threatening litigation, Chen began searching for an attorney to get advice on discharging Zhao. This concern about potential litigation is what led to the delay in notifying Zhao, to allow time for Respondent's attorney to prepare a release agreement.

The General Counsel also argues animus based on Respondent's pretextual or shifting explanations for discharging Zhao.³⁰ The arguments are that Respondent's discharge letter states Zhao was not a good fit but provided her with no evidence as to why. Chen testified that Zhao was "emotional" because she yelled and screamed at him, hung up on him, and did not respond to his WeChat message or subsequent phone call. Yet, these reasons were also not provided to Zhao at the time of her discharge. Also, Respondent did not raise any issues about Zhao's performance prior to her discharge. From the General Counsel's perspective, the most significant evidence is Middick's statement during his call with Zhao that Chen discharged her because of her text message, which establishes the necessary causal connection between that protected activity and her discharge. I reject these arguments.

As discussed, the decision to discharge Zhao began before any purported protected concerted activity occurred. Chen believed from Zhao's inability/failure to perform the assigned task and her reaction to him during the call that she would not be a successful employee, particularly considering the company's small size and the need for employees to effectively communicate with one another. It is further worth noting that this occurred within Zhao's first month of employment. Her subsequent text message to Chen threatening him with litigation solidified Chen's decision to discharge her. As Middick reported to Zhao,

²⁹ The General Counsel cites to *Bates Paving and Sealing Inc.*, 364 NLRB No. 46 (2016). In that case, employees met with management to raise concerns about their working conditions, including the abusive conduct of one of their supervisors. At a subsequent meeting, an employee raised concerns that generally aligned with those previously raised, and he was later disciplined and discharged. The Board found a violation holding that "[c]oncerted activity directed toward rude, belligerent, and overbearing behavior by a supervisor that directly affects employees' work constitutes protected activity under the Act." *Id.* slip op. at 3. Here, as stated, Zhao was not raising concerns about Chen's treatment of others; she was raising concerns about his treatment of her during their telephone conversation.

³⁰ The General Counsel also alleges animus based on Chen's alleged interrogation of Lu. As stated, I found Chen did not unlawfully interrogate Lu.

Chen contacted an attorney for advice after receiving the text and that attorney recommended discharging her. The testimony of Middick and Chen establish it was the combination of these factors that led to her discharge, which is consistent with the statement that Zhao was discharged because she was not a good fit.

5 For these reasons, the General Counsel failed to establish animus and a causal connection.

Consequently, I find the General Counsel failed to establish a prima facie case of discrimination regarding Respondent's decision to discharge Zhao.

10 C. Attorney's Letter to Zhao

In the amendment to the complaint, the General Counsel alleges Respondent violated Section 8(a)(1) when its attorney, Allison Battiste, sent her January 15 letter to Zhao about ceasing all communication with company employees. In assessing whether an employer's statement violates Section 8(a)(1), the Board applies an objective standard and examines the totality of the circumstances to determine whether it would reasonably tend to interfere with, restrain, or coerce a reasonable employee in the exercise of their Section 7 rights. *Hendrickson USA, LLC*, 366 NLRB No. 7, slip op. at 5 (2018); *Westwood Health Care Center*, 330 NLRB 935, 940 fn. 17 (2000).³¹

20 The General Counsel asserts that Battiste's letter "prohibited [Zhao] from raising any questions or concerns regarding her employment to any other employee ..." and threatened her with legal consequences if she did not comply. The General Counsel is playing fast and loose with the wording of the letter. The letter begins and focuses almost entirely on Zhao's failure to abide by "her duty" to return all company property in her possession. In the letter, Battiste "demands" that Zhao return that property by January 28 and threatens that if Zhao does not "comply with [her] obligations" as outlined, Respondent reserved the right to take legal action against her. Then, in a separate paragraph, Battiste "requested" that Zhao cease all further communications with the company's owners and employees and direct any further questions or concerns regarding her former employment, or the return of company property, to Battiste.

30 In isolation, the request not to communicate may appear overbroad, but when viewed in context, I conclude it is not. The threats of legal action related to Zhao's continued refusal to abide by her obligation to return the company's property, not her continued communication with other employees. As outlined, Middick had been attempting to facilitate the return of the company's property. Zhao responded to his emails with repeated "requests" and threats of legal action. On February 13, Middick informed Zhao he was not authorized to respond to her other requests. Zhao replied by threatening that she would contact the parent company to report Respondent's "misconduct" and "poor administration." It was at this point, and in response to these email exchanges, that Battiste sent her letter to Zhao. In reviewing the totality of the circumstances, I find Battiste's letter did not restrict or prohibit Zhao from communicating with company employees in a manner that violated Section 8(a)(1).³²

³¹ Respondent argues the allegation should be dismissed because Zhao, as a former employee, was not entitled to the Act's protections. I reject this argument as the Board has held former employees are protected by the Act. See generally, *Redwood Empire, Inc.*, 296 NLRB 369, 391 (1989). I also reject Respondent's claim that Zhao lost the Act's protection by her conduct of allegedly engaging in a strike by not performing the task Chen had asked of her during their January 5 telephone conversation.

³² Even if I were to conclude that Respondent had committed a violation of Section 8(a)(1) with the January 15 letter, I find no remedial order is necessary because it is of an isolated and de minimis nature. See generally, *St. Rita's Med. Ctr.*, 261 NLRB 357, 361 (1982); *Bellinger Shipyards, Inc.* 227 NLRB 620 (1976); *Wichita Eagle & Beacon Publishing Co.*, 206 NLRB 55 (1973); *Square D Company*, 204 NLRB 154, 154 (1973); and *American Federation of Musicians, Local 76 (Jimmy Wakely Show)*, 202 NLRB 620 (1973). It is instructive to note that when determining

CONCLUSION OF LAW

Based on the foregoing, I conclude that Respondent has not violated Section 8(a)(1) of the Act.

On these findings of fact and conclusion of law, and on the entire record, I issue the following recommended³³

ORDER

The complaint, as amended, is dismissed in its entirety.

Dated at Washington, D.C., November 17, 2021.



Andrew S. Gollin
Administrative Law Judge

whether an unlawful statement is de minimis in an election context, the Board considers factors such as: the number of incidents, their severity, the extent of dissemination, the size of the unit, and other relevant factors. See *Super Thrift Markets*, 233 NLRB 409, 409 (1977); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). This is a single incident, that was not severe, and was not disseminated to any other employee.

³³ If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.